Canada Industrial Relations Board Conseil canadien des relations industrielles

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Reasons for Decision

Sylvie St-Pierre,

complainant,

and

Canadian Union of Postal Workers,

respondent,

and

Canada Post Corporation,

employer.

Board File: 28987-C
Neutral Citation: 2012 CIRB **662**
November 7, 2012

The Canada Industrial Relations Board (the Board), composed of Mr. Claude Roy, Vice-Chairperson, sitting alone pursuant to section 14(3) of the *Canada Labour Code (Part I – Industrial Relations)* (the *Code*) considered the complaints in the above-noted matter. The Board held a pre-hearing teleconference on April 30, 2012, and a hearing in Montréal on May 30 and 31 and June 1 and 14, 2012.

Appearances

Mr. Charles-Antoine Danis, for Ms. Sylvie St-Pierre;

Ms. Céline Allaire and Mr. Francis Bénard, for the Canadian Union of Postal Workers;

Ms. Stéfanie Germain and Ms. Brigitte Bourcier, for the Canada Post Corporation.

These reasons for decision were written by Mr. Claude Roy, Vice-Chairperson.

I–Nature of Complaints

[1] This matter involves two complaints filed by Ms. Sylvie St-Pierre (the complainant) pursuant to section 97(1) of the *Code* on October 1, 2011, and November 23, 2011. The complainant, an employee of the Canada Post Corporation (the CPC or the employer), alleges that the Canadian Union of Postal Workers (the union) breached its duty of fair representation under section 37 of the *Code*. In both complaints, she states that the union failed to act on her requests for a grievance investigation and refused to file associated grievances. She alleges that the union acted arbitrarily and in bad faith in making its decisions. At the hearing of May 30, 2012, counsel for the complainant amended the two complaints to add discrimination to the grounds alleged against the union.

II–Background and Facts

A–The Complainant

[2] The complainant has worked for the employer as a rural mail carrier with the Sainte-Julie station since 2004. She started working as a rural mail carrier for Champion Transport, a contractor with the CPC, on May 1, 1990. On May 1, 1993, within the framework of a tendering process, she obtained her first rural route contract as a contractor. The contract, which was renewable and renegotiable, was renewed in 1998 and 2003. In 2003, the employer and the union launched a process to hire 6,000 rural and suburban mail carriers (RSMCs) across Canada. Those mail carriers became employees of the CPC on January 1, 2004. On July 28, 2003, a memorandum of agreement (MOA) regarding the integration of the 6,000 employees had been signed by the union and the employer, and that MOA had been incorporated into the collective agreement signed on September 30, 2003. The date for determining the length of continuous employment for the new employees had been set at January 1, 2004. To distinguish the employees in terms of their employment start date, it had been decided that the date would be the date on which they had started their contractual relationship with the employer. The complainant's date had accordingly been established as May 1, 1990.

[3] In late September or early October 2007, on the recommendation of her supervisor, Mr. Armand Lauzon, the complainant embarked on a process to become a supervisor. On May 22, 2008, after the complainant had successfully undergone exams and an interview, the employer offered her a temporary assignment as a mail carrier supervisor at the Côte-des-Neiges station in Montréal for the period from June 1 to August 2, 2008. The assignment meant higher wages, but in order to keep her mail route, the complainant had to find someone to fill in for her and had to cover all associated costs, including the substitute's wages. She approached Mr. Lauzon and Ms. Brigitte Bourcier, the human resource officer, to enquire about the ramifications of the temporary supervisory assignment for her seniority. According to the complainant, they both assured her that she could lose up to six months of continuous employment without any loss of seniority, although she would not continue to accumulate seniority during the assignment. There was no discussion of the method used for the calculation, that is, whether it was according to her ranking based on the May 1, 1990, start date or according to the seniority date of January 1, 2004. On July 23, 2008, the employer advised her that her assignment had been extended from August 3 to September 6, 2008.

[4] The complainant resigned from that position on August 20, 2008, for personal reasons. The employer confirmed in writing that the end date of the temporary assignment was August 20, 2008, and that the date of her resumption of her employment as a rural mail carrier with the Sainte-Julie station was August 24, 2008. In the letter, the employer also stated the following:

> Please note that, upon your return to your substantive position, your new seniority date as an RSMC will be March 26, 2004, in accordance with article 8.04 of the RSMC collective agreement, respecting loss of seniority.
>
> (translation)

[5] The complainant paid no attention to this change in her seniority date to March 26, 2004, especially since, when she checked her ranking on the seniority list in December 2008, she noted that she had actually moved up on the list, from 1062nd to 1015th place on July 3, 2008, and to 948th place on December 31, 2008.

[6] Seniority lists are released twice a year, in July and at year end. On July 20, 2009, the complainant could not find her name on the list. She was told that her name was a few pages

farther down, in 3517th position. On the December 8, 2009, list, her name had dropped to 4188th place, and her seniority date was given as March 23, 2004, instead of March 26, 2004, as a result of a change made by the employer on August 31, 2009, following a calculation of the exact number of days the complainant had worked as a supervisor. In early August 2009, the complainant called the union office in Montréal and explained the situation to Ms. Johanne Noël. According to the complainant, Ms. Noël responded that the employer had not made a mistake and that "that is what happens when one moves to the boss side."

[7] The complainant discussed the situation with her union steward, Mr. Luc Lamoureux, who gave her an investigation and grievance request form, which she completed on August 3, 2009. She returned the form to Mr. Lamoureux, since there was a section he had to complete, after which the union was to provide her with a written response. The complainant did not see the comments made by Mr. Lamoureux until much later, when she received a copy of her file from the union. She asked that a grievance be filed to challenge her seniority date and her ranking on the seniority list. Her request was received by the union on August 7, 2009.

[8] On September 9, 2009, a letter from the union signed by Ms. Johanne Noël of the Montréal local union and by Ms. Yvrose Pierre-Louis, director of the women's committee, advised the complainant that the union had decided not to file a grievance. A copy of the letter was also sent to Mr. Lamoureux. Only the complainant's name appeared on the letter, yet the letter was directed to her attention. The complainant maintained throughout her written submissions and testimony at the hearing that she had never received that letter.

[9] Between 2009 and 2011, the complainant believed that the transition committee created to facilitate the integration of the RSMCs would be handling her case. In mid-July 2011, she asked Ms. Micheline Ouellet, the assistant at the Sainte-Julie office, to consult her personnel file to check on the status of her grievance. In that employer file, she saw the emails exchanged by the representatives of the employer in July and August 2009 that had raised concerns about whether her time as a supervisor should be counted in determining her ranking on the seniority list or her seniority date. As explained later, the employer had decided that the only way to ensure that the complainant did not accumulate seniority for that time, in conformity with the collective agreement, would be to subtract the days the complainant had spent outside the union to arrive at

her seniority date. This resulted in her seniority date being changed from January 1, 2004, to March 26, 2004. A subsequent correction set the seniority date at March 23, 2004, based on a calculation of the exact number of days the complainant had worked outside her unit.

[10] The complainant then called Ms. Lise-Lyne Gélineau, the person responsible for grievances, to ask about the status of her grievance. Ms. Gélineau informed the complainant that the union had responded on September 9, 2009, that it would not be acting on her request for a grievance. The complainant told her that she had never received the letter and asked for a copy of her complete file. The union mailed her the file on August 8, 2011, and the complainant received it on August 10, 2011.

[11] It was at that point that the complainant first became aware of the comments that Mr. Lamoureux had added to the investigation form that he had signed on August 3, 2009. He had indicated that the July 2009 list no longer showed the complainant's ranking but that the documents were clear and the correction had to be made in accordance with the collective agreement. That list indicated that the seniority date was March 26, 2004.

[12] On September 16, 2011, counsel for the complainant sent the union a formal notice demanding that it file a grievance to challenge the complainant's seniority date and the fluctuations in her ranking. On September 27, 2011, the union responded to counsel, stating that the seniority date of March 26, 2004, indicated by the employer in the letter of August 20, 2008, was in keeping with the collective agreement. As for the fluctuations in the complainant's ranking, the union indicated that this was the first it had heard about them and referred counsel to the clause of the collective agreement respecting the time limit of 25 working days to file a grievance. It also invited the complainant to provide it with the relevant information concerning the fluctuations in her ranking on the seniority lists of March and July 2011. On September 30, 2011, the union sent the complainant an investigation form in this regard, which counsel returned on October 5, 2011. The first complaint was filed with the Board on October 1, 2011. The union responded to the complainant on October 17, 2011, to again explain its position regarding the seniority date, which was in keeping with the collective agreement, and the reasons for the fluctuations in her ranking on the seniority lists. The second complaint was filed with the Board on November 23, 2011.

B–Employer's Decision

[13] Since the complainant could not find her name on the July 2009 seniority list, she approached her sister, Ms. Ginette Gauthier, the Sainte-Julie office manager, for answers. On July 3, 2009, the latter e-mailed Ms. Brigitte Bourcier to get her to look into the matter. Ms. Bourcier in turn asked Ms. Louanne Lavergne, employee performance manager, for explanations. The latter responded on July 10, 2009, that the complainant's name was in fact on the seniority list, but in 5943rd position. In her email, she indicated that the employer had had difficulty determining what the complainant's ranking should be, but that Labour Relations had confirmed that her name should be placed at the bottom of the list of contractor entry dates.

[14] On July 16, 2009, Ms. Bourcier expressed her disagreement with this interpretation and asked Ms. Lavergne and another manager, Ms. Michèle-Sari Mousseau, to review the complainant's file. On August 14, 2009, Ms. Bourcier wrote to Ms. Lavergne again, indicating that the time that the complainant had worked in the supervisory position had to be subtracted from her contract date, which would place her somewhere between 995th and 1008th position, rather than in 3517th position, the last contractor position. On August 17, 2009, Mr. Lauzon informed Ms. Bourcier that the union would be filing a grievance in regard to the matter.

[15] On August 27, 2009, Ms. Lavergne wrote to Ms. Bourcier to inform her that she had met with Ms. Mousseau, manager of the employee performance unit, that afternoon. The latter's position was that the seniority date and the contract date were two separate things. She indicated that article 8.02 of the collective agreement stipulates that seniority is determined by the length of continuous employment of an employee within the bargaining unit since his or her last date of entry in the unit. She also indicated that a meeting with Labour Relations had been scheduled for the following Monday morning to discuss the matter and make a final decision.

[16] On August 31, 2009, Ms. Lavergne informed Ms. Bourcier that she and Ms. Mousseau had met with Mr. John Thomas, in the Labour Relations unit at the national level. They would look over their bargaining notes to check whether there was anything contrary to their position. She indicated that in the meantime the employer was maintaining its decision, as indicated in the email of August 27, 2009. It was in that email that she had informed Ms. Bourcier that they had recalculated the number of days the complainant had worked as a supervisor and had changed

her seniority date accordingly, from March 26, 2004, to March 23, 2004, but that her ranking on the seniority list had not been changed. On September 16, 2009, Ms. Lavergne advised Ms. Bourcier of the employer's final decision that no change would be made and that the contract date was merely used to break ties in seniority dates. That same day, Ms. Bourcier informed Mr. Lauzon of the employer's final decision.

[17] Ms. Mousseau confirmed at the hearing that it is the view of the employer that, since January 1, 2004, whenever an employee leaves a bargaining unit, there is a break in that employee's continuous service. She indicated that the contract date has nothing to do with the collective agreement. She testified that the employer could not subtract the time spent outside the unit from the contract date of May 1, 1990, since that date was not provided for in the collective agreement and the complainant had not been a CPC employee at that time.

C–Union's Decision

[18] On August 7, 2009, Ms. Joanne Noël received the investigation and grievance request form signed by the complainant on August 3, 2009. She was the person responsible for handling seniority cases within the grievance unit. Since she was not all that familiar with the new collective agreement, she referred the file to Ms. Nancy Beauchamp, at the regional level, who was more acquainted with the RSMC collective agreement. The latter was the one who reviewed the file and had the letter of September 9, 2009, drawn up. However, since Ms. Beauchamp was not an elected official within the local union, it was Ms. Noël who signed the letter along with Ms. Pierre-Louis, even though neither of them had reviewed the file. Ms. Noël testified that she had spoken to the complainant on September 19, 2009, and had explained that she would be losing seniority for the time she had spent in the supervisory position.

[19] The complainant's case was referred to Ms. Beauchamp on August 10 or 11, 2009, as all RSMC cases went to her. According to her testimony, she was experienced in handling such cases and had sat on the collective agreement renewal bargaining committee. She acknowledged that it had been the first time she had had to deal with such a case. She had checked the seniority list and seniority date, set at March 26, 2004, by the employer. She had checked article 8.04 of the collective agreement, which indicates that seniority does not continue to accumulate when an employee works in a supervisory position, whereas under the postal workers' collective

agreement, seniority is lost in such circumstances. She had consulted with Mr. Yves Chaloux and Mr. Michel Dulude, who were seasoned union representatives. She stated that she had not had any precedents on which to rely. According to Ms. Beauchamp, her work involves determining whether there have been any violations of the collective agreement. She called her colleague, Mr. Francis Bénard, whom she considered the person with the right qualifications to deal with RSMC cases at the national level, to enquire as to whether he had ever encountered such a case and whether the method used to subtract the time spent outside the unit had been the proper method.

[20] Mr. Bénard asked her to fill him in on the entire matter. He checked the seniority list himself and calculated the number of days that the complainant had spent outside the unit between Friday, May 30, 2008, and August 25, 2008. At the hearing, Mr. Bénard explained that there had been many errors on the seniority list of December 31, 2008, and that the list had been cancelled and a new list released on February 1, 2009. On that list, the complainant had ranked 6070th. On the June 15, 2009, list, she had ranked 3517th, but that ranking had still been incorrect. The complainant had not been properly ranked until the list of December 8, 2009, on which her name had been in 4188th position. Her ranking improved from that point on and, as of December 16, 2011, she had ranked 3768th on the list.

[21] Since the December 10, 2010, signing of the memorandum of agreement whereby employees had been given until February 28, 2011, to send in information concerning their contract start dates as contractors, changes had been made to the rankings on the list whenever confirmation documents had been accepted. Mr. Bénard was of the view that the complainant's ranking would now only improve.

[22] Mr. Bénard discussed the complainant's case with the union's national director, Mr. Philippe Arbour, who explained the intent of the parties in negotiating the clause in question. At the hearing, Mr. Bénard submitted that the CPC had made the right decision. If that interpretation was not accepted, then 6,000 grievances would be filed, since article 8.04 would be misinterpreted. Mr. Bénard subsequently informed Ms. Beauchamp, who had the letter of September 9, 2009, drawn up.

[23] On August 8, 2011, Ms. Noël again spoke with the complainant, who told her that she had never received the letter of September 9, 2009. Ms. Noël immediately sent a copy of the file to the complainant, who received it on August 10, 2011.

[24] In September 2011, the complainant's case was again referred to Mr. Bénard, who spoke with Ms. Beauchamp and Mr. Yves Chaloux via conference call. He redid the calculations and rechecked the seniority lists and came to the conclusion that the complainant had been given the proper ranking. Her ranking had fluctuated, but everything had now returned to normal. He consulted Mr. Arbour again to get his opinion.

[25] According to Mr. Bénard, a ranking is not connected with a specific person. No changes were made to the complainant's date of hire of January 1, 2004, or to her contract start date as a contractor of May 1, 1990—only to her seniority date. He pointed out that the policy was the same for all unionized employees, who had all been informed of the risk associated with moving into a supervisory position. The union has held this position since 2004.

[26] Mr. Bénard informed Ms. Beauchamp of this decision and the latter saw to the drafting of the letters signed by Ms. Gélineau on September 27, September 30 and October 17, 2011, the first of which was sent to counsel, with a copy to his client, and the other two of which were sent to the complainant, with a copy to her counsel, in which the union's position was clearly set out.

III–Positions of the Parties

A–The Complainant

[27] The complainant submits that the union twice breached its duty of fair representation, when it dealt with her investigation and grievance request of August 3, 2009, and that of September 16, 2011. She alleges that the union failed to investigate and that it acted arbitrarily in handling her first complaint, and that it also acted in bad faith by not informing her of the employer's position. She believes that this was a form of reprisal for her having worked as a supervisor during the summer of 2008. In regard to the second complaint, she alleges that the union acted arbitrarily by failing to investigate and, especially, by refusing to act, relying on the agreement of December 10, 2010, between the employer and the union, which she alleges has no bearing on her case.

[28] The complainant asks that the Board authorize the filing of a grievance at the union's expense, order that she be represented by counsel of her choice, and order that she be reimbursed for the fees paid to her counsel for representation before the Board and that she be paid $10,000 in damages.

[29] According to the complainant, the employer's decision to subtract the time worked outside the bargaining unit from her seniority date is not consistent with the wording of article 8.04 of the collective agreement, which actually indicates that seniority does not continue to accumulate when an employee works outside the bargaining unit on a temporary basis in a managerial or supervisory position. According to the complainant, this time must be subtracted from her recognized contractor date of May 1, 1990.

[30] She criticizes the union for the delay in dealing with her request to file a grievance, which she sent on August 3, 2009, and was received by the union on August 7, 2009. According to the complainant, the decision made on September 9, 2009, was made after the time limit of 25 working days provided for in the collective agreement for filing a grievance.

[31] In her view, since her case was precedent-setting because it was unique, the union should have exercised more vigilance and given it more attention.

[32] She submits that she was treated in a discriminatory manner when compared with the other employees in the unit and that her case warranted, at the very least, a legal opinion, careful investigation and a meeting with her.

B–The Union

[33] The union begins by alleging that the complaints are untimely, having been filed after the 90-day time limit provided for under section 97(2) of the *Code*.

[34] It submits that the evidence clearly shows that the complainant never asked her union representatives what could be asked concerning her seniority, her ranking or her contract start date as a contractor before she applied for and took up the supervisory position outside the bargaining unit. The union submits that Ms. Beauchamp investigated, checked with experienced

colleagues, and entered into contact with Mr. Bénard, the person who was most highly qualified in the field.

[35] The union decided not to file a grievance, as was its right, and advised the complainant of its decision on September 9, 2009. According to the union, the complainant spoke over the phone with Ms. Noël on September 19, 2009, to convey her disagreement with the union's decision and her desire to file a complaint with the Board, which was only done on October 1, 2011.

[36] With respect to the second complaint, the union submits that it proved that it had carried out a careful investigation, that Ms. Beauchamp had gone to the trouble of consulting Mr. Bénard, who in addition to checking with the person responsible at the national level, had rechecked the changes made to the complainant's ranking on the seniority list and had found everything in order.

[37] According to the union, the grievances would have been bound to fail. It acted in good faith, objectively and honestly, after a thorough study of the case. It took into account the significance of the grievance and its consequences not only for the complainant but for all members of the unit. It submits that its decision was not arbitrary, capricious, wrongful or discriminatory. The decision was made with integrity and competence, without serious or major negligence and without hostility towards the complainant.

[38] The union submits that the complainant never challenged her seniority date of March 26, 2004, set by the employer on August 20, 2008. She lost only 63 days of her seniority, that is, the time she had spent working outside the unit.

C–The Employer

[39] Although its role is limited to the matter of the remedy that might be awarded in the event that the complaints are allowed, the employer felt it important to enter into evidence the emails exchanged in July and August 2009, after the complainant's sister had intervened, in which the decision of August 20, 2008, had been confirmed. It indicated that the concerns raised by Ms. Bourcier when consulted about the proper interpretation of article 8.04 of the collective agreement had been laid to rest once and for all on September 16, 2009.

[40] The employer submits that, under article 8.02 of the collective agreement, seniority is determined by the length of continuous employment within the bargaining unit since the last date of entry in the unit of the employee who leaves the unit to hold a supervisory position and, under article 8.04, the said seniority does not continue to accumulate during the time outside the unit.

[41] According to the employer, the only way to calculate seniority is to delay the complainant's entry in the unit. Contract dates serve only to break any ties in the seniority dates of employees (including the complainant) who entered the employer's service on January 1, 2004.

[42] Had the complainant's calculation method been used, she would not have lost any seniority and would have actually gained some. Only the ranking of May 1, 1990, would have been changed, which would have been contrary to the collective agreement.

IV–Analysis and Decision

A–Applicable Law

[43] Section 37 of the *Code* provides as follows:

> 37. A trade union or representative of a trade union that is the bargaining agent for a bargaining unit shall not act in a manner that is arbitrary, discriminatory or in bad faith in the representation of any of the employees in the unit with respect to their rights under the collective agreement that is applicable to them.

[44] In *Canadian Merchant Service Guild* v. *Gagnon et al.*, [1984] 1 S.C.R. 509, the Supreme Court of Canada summarized the principles that apply to a union's duty of fair representation when dealing with a grievance as follows:

> The following principles, concerning a union's duty of representation in respect of a grievance, emerge from the case law and academic opinion consulted.
>
> 1. The exclusive power conferred on a union to act as spokesman for the employees in a bargaining unit entails a corresponding obligation on the union to fairly represent all employees comprised in the unit.
>
> 2. When, as is true here and is generally the case, the right to take a grievance to arbitration is reserved to the union, the employee does not have an absolute right to arbitration and the union enjoys considerable discretion.

3. This discretion must be exercised in good faith, objectively and honestly, after a thorough study of the grievance and the case, taking into account the significance of the grievance and of its consequences for the employee on the one hand and the legitimate interests of the union on the other.

4. The union's decision must not be arbitrary, capricious, discriminatory or wrongful.

5. The representation by the union must be fair, genuine and not merely apparent, undertaken with integrity and competence, without serious or major negligence and without hostility towards the employee.

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[45] The Court again addressed the issue of a union's conduct and the interests it is required to take into account in *Noël* v. *Société d'énergie de la Baie James*, 2001 SCC 39; [2001] 2 S.C.R. 207:

[48] This duty prohibits four types of conduct: bad faith, discrimination, arbitrary conduct and serious negligence. The conduct that is demanded applies both at the collective bargaining stage and in administering the collective agreement (see *Gagnon*, *supra*, at p. 308). First, s. 47.2 prohibits acting in bad faith, which presumes intent to harm or malicious, fraudulent, spiteful or hostile conduct (see *Becotte* v. *Syndicat canadien de la Fonction publique, local 301*, [1979] T.T. 231, at p. 235; and *Rayonier*, *supra*, at p. 201). In practice, this element alone would be difficult to prove (see G. W. Adams, *Canadian Labour Law* (2nd ed. (loose-leaf)), at pp. 13–15 to 13–18; R. E. Brown "The 'Arbitrary', 'Discriminatory' and 'Bad Faith' Tests Under the Duty of Fair Representation in Ontario" (1982), 60 *Can. Bar Rev.* 412, at pp. 453–54).

...

[50] The concepts of arbitrary conduct and serious negligence, which are closely related, refer to the quality of the union representation. The inclusion of arbitrary conduct means that even where there is no intent to harm, the union may not process an employee's complaint in a superficial or careless manner. It must investigate the complaint, review the relevant facts or seek whatever advice may be necessary; however, the employee is not entitled to the most thorough investigation possible. The association's resources, as well as the interests of the unit as a whole, should also be taken into account. The association thus has considerable discretion as to the type and extent of the efforts it will undertake in a specific case. (See *Adams*, *supra*, at pp. 13–20.1 to 13–20.6.)

[46] The Board does not sit in appeal of a trade union's decisions, nor will it substitute its opinion for a union's reasonable assessment of a particular case (see *Blacklock*, 2001 CIRB 139; and *Misiura*, 2000 CIRB 63).

[47] In *McRae Jackson*, 2004 CIRB 290, the Board defined arbitrary, discriminatory and bad faith conduct on the part of the union:

[27] A union must not act in bad faith; that is, with improper purpose. Three examples of this conduct include: the personal feelings of union officers influencing whether or not a grievance should be pursued; conspiring with the employer to have an employee disciplined or terminated; or, putting the

ambitions of a group of employees who support a union official ahead of the interests of an individual employee.

[28] A union must not discriminate on the basis of age, race, religion, sex or medical condition. Each member must receive individual treatment and only relevant and lawful matters must influence whether or not a grievance is referred to arbitration. It should be noted that not every instance of differential treatment is considered discrimination. For example, to refer one employee's grievance to arbitration and not another where there are relevant considerations to support the distinction is not discriminatory. Nor is an agreement with the employer to give different or better working conditions to a group of employees because of workplace considerations (see *Mario Soulière et al.*, [2002] CIRB no. 205; and 94 CLRBR (2d) 307).

[29] A union must not act arbitrarily. Arbitrariness refers to actions of the union that have no objective or reasonable explanation, that put blind trust in the employer's arguments or that fail to determine whether the issues raised by its members have a factual or legal basis (see *John Presseault*, *supra*, but see *Orna Monica Sheobaran*, [1999] CIRB no. 10, that upheld a complaint where the union referred an employee to the employer rather than assist the employee; and *Clive Winston Henderson*, *supra*, where the union's decision jeopardized an employee's seniority).

[30] It is arbitrary to only superficially consider the facts or merits of a case. It is arbitrary to decide without concern for the employee's legitimate interests. It is arbitrary not to investigate and discover the circumstances surrounding the grievance. Failure to make a reasonable assessment of the case may amount to arbitrary conduct by the union (see *Nicholas Mikedis* (1995), 98 di 72 (CLRB no. 1126), appeal to F.C.A. dismissed in *Seafarers' International Union of Canada* v. *Nicholas Mikedis et al.*, judgment rendered from the bench, no. A-461-95, January 11, 1996 (F.C.A.)). A non-caring attitude towards the employee's interests may be considered arbitrary conduct (see *Vergel Bugay et al.*, *supra*) as may be gross negligence and reckless disregard for the employee's interests (see *William Campbell*, [1999] CIRB no. 8).

[48] With respect to the requirement that a union consider the interests of all of its members, the Board indicated the following in *McRae Jackson*, *supra*:

[34] A union can consider legitimate factors other than the employee's interests. For example, the union and the employer may have agreed to a particular interpretation of the collective agreement during the course of collective bargaining or the union may have been unsuccessful at arbitration in a similar case. The union may be concerned that a victory would have an adverse effect on other employees of the unit. The union may decide that the cost of resolving the grievance is too high given the issue at hand. The union must weigh these factors fairly against the wishes of the employee.

[35] Conflicts may arise between the interest of an employee and the bargaining unit. For example, unions and employers may settle an ongoing grievance in exchange for bargaining concessions. In some circumstances, however, these actions may amount to unfair conduct if the grievance concerns serious discipline or dismissal (see *Centre hospitalier Régina Ltée* v. *Labour Court*, [1990] 1 S.C.R. 1330; and also *Herman Durette*, November 20, 2003 (CIRB LD 957).

[49] Again in *McRaeJackson*, *supra*, the Board found that the union had fulfilled its duty of fair representation:

> [37] Accordingly, the Board will normally find that the union has fulfilled its duty of fair representation responsibility if: a) it investigated the grievance, obtained full details of the case, including the employee's side of the story; b) it put its mind to the merits of the claim; c) it made a reasoned judgment about the outcome of the grievance; and d) it advised the employee of the reasons for its decision not to pursue the grievance or refer it to arbitration.

[50] Articles 8.02 and 8.04 of the collective agreement, whose interpretation was at the basis of the complaints in this matter, state the following:

> 8.02 Seniority
>
> Seniority shall be determined by the length of continuous employment of the employee within the bargaining unit since his or her last date of entry in the unit.
>
> ...
>
> 8.04 Accumulation of Seniority
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> Seniority continues to accumulate when an employee works outside the bargaining unit on a temporary basis, provided it is not in a managerial or supervisory position.
>
> Seniority does not continue to accumulate when an employee works outside the bargaining unit on a temporary basis in a managerial or supervisory position.

B–Decision

[51] The Board's determination of the two complaints in the instant matter must be based on proven fact and not merely on allegations of breach of duty of fair representation on the part of the union. The complainant bears the burden of proving that the union breached that duty. Under the circumstances in this matter, the Board finds that the complainant failed to discharge her burden of proof and so the complaints must be dismissed.

[52] As noted previously, the Board does not sit in appeal of a trade union's decisions. Rather, its role is to determine whether the union breached its duty of fair representation by reviewing the process followed by the union in arriving at its decisions not to act on the complainant's grievance investigation requests.

[53] The union has raised the issue of the timeliness of the complaints. It alleges that it sent the complainant the letter of September 9, 2009, even though the latter's address is not shown on the letter. An administrative assistant testified that, to protect members' personal information, the addresses of members are not written on this type of letter, but that the letters are sent in properly addressed envelopes. Moreover, Ms. Joanne Noël testified that she had spoken with the complainant over the phone on September 19, 2009. The complainant denies having received the letter of September 9, 2009, and claims that the telephone conversation in question took place prior to her sending her grievance investigation request of August 3, 2009. As regards the second complaint, the union claims that it deals with the same facts.

[54] The Board has contradictory evidence before it and so must base its decision regarding the timeliness of the complaint on the date on which the complainant was provided with a full copy of her file, that is, August 10, 2011. It is in reading through this file that the complainant first learned of the letter of September 9, 2009, even though a copy had been sent to her union steward, Mr. Luc Lamoureux. No evidence was adduced at the hearing respecting any action he may have taken in regard to the letter. The complaint of October 1, 2011, was therefore filed within the 90-day time limit provided for under the *Code*. As for the second complaint, filed on November 23, 2011, although it may deal with the same facts, it was filed following the union's response of October 17, 2011, that it would not be acting on her second request for a grievance investigation. This complaint was also filed within the time limit set out in the *Code*.

[55] Turning to the merits of this matter, the Board notes that the issue of the interpretation of articles 8.02 and 8.04 of the collective agreement was not an easy one to resolve. Nevertheless, it was a matter of interpretation, which the union considered prior to arriving at a different conclusion from the complainant's.

[56] The employer revisited the interpretation of the articles of the collective agreement in August 2009, at Ms. Bourcier's request. On September 16, 2009, it confirmed its decision of August 20, 2008.

[57] The union was not made aware of the employer's concerns at the time. It learned of them in the context of the proceedings before the Board. The issue was clearly a significant one, especially given that this was the first time it had been raised.

[58] The Board must examine the union's investigation process to make a determination regarding the complaints in this matter. Clearly, the issue raised, that is, how time worked outside the unit by the complainant should be applied under section 8.04 of the collective agreement, is not an easy one to resolve. Although it might be an interesting issue to put before a grievance arbitrator, the Board's jurisdiction is limited to reviewing the process followed by the union in deciding not to act on the complainant's grievance investigation requests. It is not its role to address the merits of the union's decisions not to act on the requests.

[59] The Board must assess whether, in making its decisions, the union acted in a manner that was arbitrary, in bad faith, or discriminatory. Did the union merely rid itself of the matter, or did it conduct a thorough study? In cases involving interpretation of a collective agreement, the Board's role is not to provide an interpretation unless the union's decision is frivolous and unreasonable.

[60] The evidence as previously laid out leads the Board to find that, on a balance of probabilities, the union gave careful consideration to both of the complainant's grievance investigation requests. It is clear that what prompted the complainant and her counsel to file the complaints was the discovery in July 2011 of the employer's emails exchanged in August 2009, but the union was not informed of the employer's concerns at the time. The union conducted an independent analysis and concluded that the employer's decision of August 20, 2008, was the proper decision. Ms. Beauchamp consulted with experienced colleagues in August 2009 and referred the matter to Mr. Bénard for both complaints. The latter dealt with the matter thoroughly and professionally and consulted with Mr. Arbour regarding each grievance investigation request.

[61] It is true that Ms. Beauchamp did not sign the letters signed by Ms. Noël, Ms. Pierre-Louis and Ms. Gélineau, but she was the one who saw to their drafting and, in any event, the fact that she did not sign the letters does not mean that the union's conduct was reprehensible.

[62] The Board cannot find that the union acted in a manner that was arbitrary or in bad faith on the basis of the evidence previously detailed. As for the allegation of discrimination, the Board sees nothing in the evidence to demonstrate that the complainant may have been treated differently because of her age, gender, race, religion or health. The union arrived at its decision

on the basis of the interests of all of its members, and the Board is unable to find that its conduct was contrary to section 37 of the *Code*. The decision as to whether or not to file a grievance lies with the union and its decisions in the instant matter were reasonable. The Board notes in closing that it should be borne in mind that the complainant never consulted her union before accepting the temporary assignment to the supervisory position offered by the employer. The misunderstanding may be the result of a lack of understanding of the information the complainant received from her employer's representatives and the Board is unable by virtue of this fact to find any fault on the part of the union.

V–Conclusion

[63] For the above reasons, the complaints in the instant matter are dismissed.

[64] This is a decision of the Board and it is signed on its behalf by

Translation

Claude Roy
Vice-Chairperson